

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

SBA Towers II, LLC

v.

Civil No. 09-cv-447-LM

Town of Atkinson

O R D E R

Before the court is defendant Town of Atkinson's ("Town") motion for summary judgment. Doc. No. 15. For the following reasons, the motion is denied.

The summary judgment motion raises the same issues resolved by this court's order of March 15, 2010, denying the Town's motion to dismiss. There being no material factual disputes, the court makes the following findings and rulings, consistent with its March 15 order:


- (1) The parties' Stipulation and Addendum¹ contain a permissive, rather than mandatory, forum selection clause for disputes arising from "proposed changes to the use of the needle tower." The instant case involves such a dispute. Therefore, the Stipulation and Addendum impose no impediment to this court's

¹The Stipulation and Addendum consists of a stipulation between plaintiff SBA Towers II, LLC's ("SBA") predecessor-in-interest and the Town, entered into on January 22, 1985, and an amendment to the stipulation, entered into on October 21, 2005. See Doc. No. 6-1.

jurisdiction to hear SBA's claims under the Telecommunications Act of 1996, 47 U.S.C. § 332 (c) (7) (B) ("TCA").

- (2) Under §§ 332(c) (7) (B) (iii) and (v) of the TCA, this court has jurisdiction to review the Town's decision of November 23, 2009, denying SBA's request for approval of changes to SBA's communication tower.
- (3) The principles of collateral estoppel and res judicata do not bar this court's review of the Town's November 23 decision under either § 332(c) (7) (B) (i) (II) ("effect of prohibiting") or § 332(c) (7) (B) (iii) ("substantial evidence"), of the TCA, as those issues have never been resolved by this or any other court.

SO ORDERED.



Landya B. McCafferty
United States Magistrate Judge

Dated: November 16, 2010

cc: Steven E. Grill, Esq.
Thea S. Valvanis, Esq.